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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ATTILIC CELLA,

Defendant and Appellant.

A133851

(San Francisco County
Super. Ct. No. 216144)

Defendant pleaded guilty to one count of second degree robbery (Pen. Code, § 211)¹ and one count of receiving stolen property (§ 496, subd. (a)) in connection with the taking of a woman's property at a coffee shop. He thereafter filed a motion to withdraw his plea, arguing that he could not be convicted of both crimes in connection with the same stolen property. The trial court denied the motion and sentenced defendant to two years in prison. This appeal followed. Because defendant did not obtain a certificate of probable cause, we dismiss his appeal.

I.
FACTUAL AND PROCEDURAL
BACKGROUND²

On April 20, 2011, a woman left her laptop computer, iPhone, and phone charger unattended while she used the restroom at a coffee shop in San Francisco. When she

¹ All statutory references are to the Penal Code.

² The following facts are taken from the probation report, as defendant pleaded guilty before a preliminary hearing was held.

returned from the restroom, the victim saw defendant leaning over her laptop, then leave the building. The victim noticed that her phone and charger were missing, followed defendant and demanded the return of her property, but then ran away when defendant threatened her with a knife. Police arrested defendant a short time later, and a search revealed a charging cord and a knife. The victim identified defendant as the person who had taken her phone.

Defendant was charged by felony complaint with second degree robbery (§ 211—count 1) and receiving stolen property (§ 496, subd. (a)—count 2), with an allegation as to both counts that he personally used a deadly and dangerous weapon (a knife) during the commission of the crimes (former 12022, subd. (b)(1)). The complaint further alleged that defendant previously had been convicted of a crime that qualified as both a strike and a serious felony. (§§ 667, subds. (a)(1), (d), (e), 1170.12, subds. (b)-(c).)

At the start of a hearing on June 22, 2011, the trial court stated that it would agree to an open plea in exchange for an indicated sentence of two years in prison, over the People's objection. Defense counsel stated that she had informed defendant of the constitutional rights he would be waiving and the legal consequences of a guilty plea. As for sentencing, defense counsel stated: "I have informed the defendant that the Court will sentence him as follows: [¶] The defendant will be sentenced to state prison for the low term on Count 1 of two years and to the mid term on Count 2 for two years concurrent to the sentence on Count 1." The court confirmed that "the low term for Count 1 [robbery] is two years, and the mid term for Count 2 [receiving stolen property] is two years. That will be concurrent." Defendant then pleaded guilty to both counts after waiving his constitutional rights and stating that his plea was freely and voluntarily entered. Defense counsel stipulated to a factual basis for the plea, based on the police report, and the matter was continued for sentencing.

The parties returned to the courtroom later in the day for a change of disposition, stating that the case would no longer be an open plea, but a plea negotiated with the district attorney's office. The prosecutor stated that the serious felony allegation (§ 667, subd. (a)(1)) that would add five years to defendant's sentence could not be stricken, but

that the People would agree to dismiss the allegation in light of the victim's view of the case. The prosecutor then said that the district attorney's office would agree to the disposition negotiated between the trial court and defendant if defendant would waive half his credits, which he agreed to do. The proposed disposition remained two years on both counts, and the matter was again put over for sentencing.

Defendant thereafter filed a motion to withdraw his plea (§ 1018) on the ground that the plea agreement was "illegal," arguing that one cannot be convicted in the same proceeding of both robbery and receiving stolen property, based on the same taking of property. (E.g., *People v. Ceja* (2010) 49 Cal.4th 1, 3, 6-7.) Defendant also contended that his guilty plea was not knowing, intelligent, or voluntary, but instead was the product of "incorrect advice and resulting duress," and that he would not have entered a plea had he known that he could not be tried on both charges. The People opposed the motion, arguing that (1) the prohibition on dual convictions was inapplicable because the convictions were the product of a negotiated disposition, and (2) even if the dual convictions amounted to error, the proper remedy was to sentence defendant to two years on the robbery count, instead of permitting him to withdraw his plea.

The trial court denied the motion, stating that "[t]he negotiated disposition is what's stated. The transcript is very clear as to what happened. . . . [H]e was more than able to make a decision as to whether or not he wants to accept this." The court then sentenced defendant to the low term of two years on count 1 (second degree robbery) and the mid-term of two years on count 2 (receiving stolen property), to be served concurrently. Defendant filed a timely notice of appeal; however, he did not obtain the requisite certificate of probable cause.

II. DISCUSSION

Defendant renews his objection that he cannot be convicted of both stealing and receiving the same property, and that his conviction for receiving stolen property must therefore be reversed. (§ 496, subd. (a); *People v. Ceja*, *supra*, 49 Cal.4th at pp. 3-4, 8.) We agree with respondent that this claim amounts to a challenge to the validity of defendant's plea, which is barred because defendant did not obtain a certificate of probable cause.

"[S]ection 1237.5 provides that a defendant may not take an appeal from a judgment of conviction entered on a plea of guilty or nolo contendere unless he has filed in the superior court a statement of certificate grounds, which go to the legality of the proceedings, including the validity of his plea, and has obtained from the superior court a certificate of probable cause for the appeal." (*People v. Mendez* (1999) 19 Cal.4th 1084, 1095.) Defendant need not comply with this procedure if the notice of appeal states that the appeal is based on (1) the denial of a motion to suppress (§ 1538.5) or (2) grounds that arose after entry of the plea and that do not affect the plea's validity (the exception identified in defendant's notice of appeal here). (Cal. Rules of Court, rule 8.304(b)(4)(A)-(B).)

Perhaps recognizing that a challenge to his receiving stolen property conviction is in fact an attack on his plea's validity, which this court may not review absent a certificate of probable cause, defendant claims that he is instead attempting to *enforce* the terms of the plea agreement. He relies on the general rule that due process requires that a defendant be sentenced in accordance with the terms of a plea bargain. (E.g., *Santobello v. New York* (1971) 404 U.S. 257, 262.) However, it is unclear which term (or terms) defendant contends went unenforced. Defendant argues that "his agreement to plead guilty to both counts in the complaint should be interpreted as an admission that, in the course of the theft, he committed the crime of robbery and also the crime of receiving stolen property." Having made such an admission, it follows that his conviction on both counts should stand.

Even assuming a probable cause certificate was not required, the remaining arguments also lack merit. Defendant claims that “[t]he plea agreement did not express anything related to how the guilty plea to receiving known stolen property would be treated.” To the contrary, both defense counsel and the trial court told defendant before he pleaded guilty that he would receive two years on the second degree robbery count and a two-year concurrent sentence on the receiving stolen property count.³ The minute order following defendant’s guilty plea to both counts likewise states that the proposed disposition was “State prison 2 Y[ear] low term count 1, 2Y[ear] *mid term count 2.*” (Italics added.)

Defendant also argues that the advisement he would receive a concurrent sentence for the receiving stolen property count “inaccurately described the consequences of his plea,” and that it “appears that the prosecutor and the court interpreted these advisements to constitute part of the plea agreement.” Defendant does not identify what was “inaccurate[.]” about the statements that defendant would receive a two-year concurrent sentence on count two. We agree with the trial court that the transcript of the negotiated disposition was “very clear as to what happened,” and defendant was sentenced consistent with the court’s indicated sentence.

For the same reasons, we disagree with defendant that this was a situation where the trial court implied a term into the plea agreement that was not stated on the record, because defendant was told *twice* that he would be sentenced on both counts after pleading guilty. (Cf. *People v. Feyrer* (2010) 48 Cal.4th 426, 437-438 [court would not imply into plea agreement term that defendant’s felony conviction could not later be reduced to a misdemeanor, § 17].) Defendant correctly sets forth the rule that where a

³ Defendant states that he entered into an “open plea,” whereby the trial court gave him an indicated sentence, he pleaded guilty to all charges, and all that remained was the pronouncement of judgment and sentencing. (*People v. Turner* (2004) 34 Cal.4th 406, 418-419.) Although the parties later changed the plea to one negotiated with the district attorney’s office, no changes were made to expected sentence, except that defendant waived half his credits. Indeed, defendant acknowledges on appeal that “the terms of the plea agreement with the prosecutor did not change anything in relation to the count for possession of stolen property.”

defendant “knowingly, intelligently and expressly agrees to certain aspects of a proposed negotiated disposition, i.e., sentencing irregularities, to obtain the overall benefits of a negotiated disposition, he is estopped to complain,” but contends that he did not specifically agree to a “sentencing irregularity.” (*People v. Velasquez* (1999) 69 Cal.App.4th 503, 506.) First, unlike the appellant in *Velasquez*, upon which he relies, defendant here does not claim that the sentence he received on either count was not facially authorized by law. (*Id.* at p. 506.)

As we understand defendant’s argument, he is not specifically challenging his sentence, but instead contends that it was a mistake to subject him to an “improper conviction.” This is in substance a challenge to the validity of defendant’s plea, which, again, is barred by his failure to secure a certificate of probable cause. (*People v. Jones* (1995) 33 Cal.App.4th 1087, 1093-1094.) This case is almost identical to *Jones* (not cited by either party), where defendant pleaded no contest to burglary and possession of stolen property, then argued on appeal that she could not lawfully be convicted both of stealing and of receiving the same property. (*Id.* at pp. 1088-1089, 1091.) The appellate court dismissed the appeal without reaching the merits, because defendant had not obtained a certificate of probable cause in the trial court. (*Id.* at pp. 1091, 1094.) “Claims regarding the illegality of the judgment, whether on jurisdictional or other grounds, are precisely the types of claims which are covered by Penal Code section 1237.5 and require a certificate of probable cause. ‘A judgment entered on a plea of guilty or nolo contendere is . . . not reviewable on the merits. [Citations.]’ ” (*Id.* at p. 1092.) Because defendant here likewise challenges the legality of the judgment, his claim is barred by his failure to obtain a certificate of probable cause. (*Ibid.*)

For the same reason, we do not consider the merits of defendant’s related contention that there was an insufficient factual basis for his plea because the incident report did not reveal facts upon which both a robbery and a receiving stolen property conviction could be based. Again, we understand this to be a challenge to the legality of defendant’s convictions. We also note that in the case upon which defendant relies for this argument, the appellant *satisfied the requirements of section 1237.5* before attacking

on appeal the trial court's record inquiry into the factual basis for his plea. (*People v. Watts* (1977) 67 Cal.App.3d 173, 177-178.)

The fact that defendant's appeal followed the denial of a motion to withdraw his plea does not alter our analysis. "If a defendant challenges the validity of his plea by way of a motion to withdraw the plea, he cannot avoid the requirements of section 1237.5 by labeling the denial of the motion as an error in a proceeding subsequent to the plea." (*People v. Ribero* (1971) 4 Cal.3d 55, 63-64.) " 'Section 1237.5 does not limit the scope of review of the denial of a motion to withdraw a plea of guilty when that error is properly before the court on appeal. It merely sets forth a procedure for precluding frivolous appeals by requiring the defendant to set forth grounds for appeal and, if he does so, by requiring the trial court to rule on the issue of probable cause.' " (*People v. Johnson* (2009) 47 Cal.4th 668, 676.)

" 'When a defendant fails to satisfy the requirements of section 1237.5, and the record discloses no justification therefor, the appeal is not operative, and the appropriate disposition is dismissal.' [Citations.]" (*People v. Jones, supra*, 33 Cal.App.4th at p. 1094.)

III. DISPOSITION

The appeal is dismissed.

Baskin, J.*

We concur:

Ruvolo, P.J.

Reardon, J.

* Judge of the Contra Costa Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.